

§ 1251.1

1251.18 Are there any restrictions that apply to the production of records?

1251.20 Are there any fees associated with providing records or testimony?

1251.22 Are there penalties for providing records or testimony in violation of this part?

AUTHORITY: 44 U.S.C. 2104; 44 U.S.C. 2108; 44 U.S.C. 2109; 44 U.S.C. 2111 note; 44 U.S.C. 2112; 44 U.S.C. 2116; 44 U.S.C. ch. 22; 44 U.S.C. 3103.

SOURCE: 73 FR 79393, Dec. 29, 2008, unless otherwise noted.

§ 1251.1 What is the purpose of this part?

(a) This part provides the policies and procedures to follow when submitting a demand to an employee of the National Archives and Records Administration (NARA) to produce records or provide testimony relating to agency information in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of records or agency information.

(b) The National Archives and Records Administration intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize NARA's role in controversial issues not related to its mission;

(3) Maintain NARA's impartiality among private litigants when NARA is not a named party; and

(4) Protect sensitive, confidential information and the deliberative processes of NARA.

(c) In providing for these requirements, NARA does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of NARA. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 1251.2 To what demands does this part apply?

This part applies to demands to NARA employees for factual, opinion, or expert testimony relating to agency information or for production of records in legal proceedings whether or not NARA is a named party. However, it does not apply to:

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(a) Demands upon or requests for a NARA employee to testify as to facts or events that are unrelated to his or her official duties and that are unrelated to the functions of NARA;

(b) Demands upon or requests for a former NARA employee to testify as to matters in which the former employee was not directly or materially involved while at NARA;

(c) Requests for the release of, or access to, records under the Freedom of Information Act, 5 U.S.C. 552, as amended; the Privacy Act, 5 U.S.C. 552a; the Federal Records Act, 44 U.S.C. chs. 21, 29, 31, 33; the Presidential Records Act, 44 U.S.C. ch. 22; or the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note;

(d) Demands for records or testimony in matters before the Equal Employment Opportunity Commission or the Merit Systems Protection Board; and

(e) Congressional demands and requests for testimony or records.

§ 1251.3 What definitions apply to this part?

The following definitions apply to this part:

Court of competent jurisdiction means, for purposes of this part, the judge or some other competent entity, as authorized by statute or regulation or other lawful means, and not simply by an attorney or court clerk, must sign a demand for records the disclosure of which is constrained by the Privacy Act, 5 U.S.C. 552a because section (b)(11) of the Act requires appropriate authorization of a court of competent jurisdiction. See *Doe v. Digenova*, 779 F.2d 74 (D.C. Cir. 1985); *Stiles v. Atlanta Gas Light Company*, 453 F. Supp. 798 (N.D. Ga. 1978).

Demand means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records in a legal proceeding, or for the appearance and testimony of a NARA employee in a legal proceeding.

General Counsel means the General Counsel of NARA or a person to whom the General Counsel has delegated authority under this part. General Counsel also means the Inspector General of NARA (or a person to whom the Inspector General has delegated authority

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under this part) when a demand is made for records of NARA's Office of the Inspector General, or for the testimony of an employee of NARA's Office of the Inspector General.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, legislative body, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

NARA means the National Archives and Records Administration.

NARA employee or employee means:

(1) Any current or former officer or employee of NARA, except that this definition does not include former NARA employees who are retained or hired as expert witnesses concerning, or who agree to testify about, matters available to the public or matters with which they had no specific involvement or responsibility during their employment with NARA;

(2) Any other individual hired through contractual agreement by or on behalf of NARA or who has performed or is performing services under such an agreement for NARA;

(3) Any individual who served or is serving in any consulting or advisory capacity to NARA, whether formal or informal; and

(4) Any individual who served or is serving in any volunteer or internship capacity to NARA.

Records or agency information means:

(1) Archival records, which are permanently valuable records of the United States Government that have been transferred to the legal custody of the Archivist of the United States;

(2) Operational records, which are those records that NARA creates or receives in carrying out its mission and responsibilities as an executive branch agency. This does not include archival records as defined above in this section;

(3) All documents and materials which are NARA agency records under the Freedom of Information Act, 5 U.S.C. 552, as amended;

(4) Presidential records as defined in 44 U.S.C. 2201; historical materials as defined in 44 U.S.C. 2101; records as de-

fined in 44 U.S.C. 2107 and 44 U.S.C. 3301;

(5) All other documents and materials contained in NARA files; and

(6) All other information or materials acquired by a NARA employee in the performance of his or her official duties or because of his or her official status.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

§ 1251.4 May employees provide records or give testimony in response to a demand without authorization?

No, except as otherwise permitted by § 1251.14 of this part, no employee may produce records and information or provide any testimony relating to agency information in response to a demand, or other legal request, without the prior, written approval of the General Counsel.

§ 1251.6 How does the General Counsel determine whether to comply with a demand for records or testimony?

The General Counsel may consider the following factors in determining whether or not to grant an employee permission to testify on matters relating to agency information, or permission to produce records in response to a demand:

(a) NARA's compliance with the demand is required by federal law, regulation or rule, or is otherwise permitted by this part;

(b) The purposes of this part are met;

(c) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(d) NARA has an interest in the decision that may be rendered in the legal proceeding;

(e) Allowing such testimony or production of records would assist or hinder NARA in performing its statutory duties;

(f) Allowing such testimony or production of records would involve a substantial use of NARA resources;

(g) Responding to the demand would interfere with the ability of NARA employees to do their work;